"**REPORTABLE**"

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A 99/2008

In the matter between:

J T THEART	1st Appellant
COPPERSUN (PTY) LTD	2nd Appellant
v	
DEON MINNAAR N.O.	Respondent

Coram	**:**	**Cleaver *et* Zondi JJ**
Counsel for the appellants	**:**	**Adv B Wharton**
Attorneys for the appellants	**:**	**R P Totos Attorneys (Mr R P Totos)**
Counsel for respondent	**:**	**Adv C H J Maree**
Attorneys for respondent	**:**	**Van der Spuy & Partners (Western Cape) (Mr G Stofberg)**
Date of Hearing	**:**	**1 August 2008**
Date of Judgment	**:**	**7 August 2008**

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CASE NO: A 99/2008

In the matter between:

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v

DEON MINNAAR N.O. Respondent

JUDGMENT GIVEN THIS THURSDAY, 7 AUGUST 2008

CLEAVER J:

[1] The issue in this matter, which is an appeal against a decision given by the magistrate at Stellenbosch, is the interpretation to be given to section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE").

[2] The relevant portions of the section read as follows:

"***4. Eviction of unlawful occupiers***

(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in ss (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of ss (2), the procedure for the serving of notices and filing of papers is as prescribed by the Rules of the court in question.

(4) Subject to the provisions of ss (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner

provided in the Rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in ss (2) must –

(a) state that proceedings are being instituted in terms of ss (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[3] Relying on certain remarks by **Brand** AJA, as he then was, in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*[1] counsel for the appellants contended that the appellants were entitled to receive two notices, namely a notice in terms of section 4(2) of PIE and a notice in terms of Rule 55 of the Magistrates' Court Act, in proceedings for the appellants' ejectment which had been brought by way of motion. Counsel relied particularly on the statement *"it is clear, in my view that this notice in terms of the Rules of Court is required in addition to the s 4(2) notice. Any other construction will render the requirements of s 4(3) meaningless."*[2]

[4] In *Cape Killarney* **Brand** AJA explained that in High Court proceedings brought by way of application, the date for the hearing of the matter would be determined only after all the papers on both sides had been served and he accordingly concluded that it was at that stage that a section 4(2) notice could be authorised

1 2001 (4) SA 1222 at 1227A-D

2 At p1227J (para [12])

and directed by the court. As pointed out by counsel for the respondent however, these remarks relate to the peculiar situation in an opposed High Court application; and further that the Rules of the magistrates' courts do not permit of a similar procedure. In an unreported judgment delivered by a full bench in this division on 19 March 2008[3], **Oosthuizen** AJ expressed the view that the *dictum* of **Brand** AJA should not be regarded as imposing a requirement of substantive law in all eviction proceedings, nor should such *dictum* be applied to such proceedings other than those initiated by way of notice of motion in the High Court. This must be so, for there is no provision in the Rules of the Magistrates' Courts by which a similar result could be achieved in the magistrates' court.

[5] As I read section 4 of PIE, it simply requires a written notice containing the information listed in section 4(5) to be served on the unlawful occupier of the premises at least 14 days before the hearing of an application for his eviction. As explained by the learned judge in *Cape Killarney*, for the notice to comply with the provisions of section 4(2), it must be authorised and directed by an order of the court concerned[4].

[6] It was also made clear in *Cape Killarney* that the authorisation of the notice by the court may be effected *ex parte.*

[7] The method adopted by the respondent in order to have its notice in terms of section 4(2) authorised is somewhat unusual. On 24 October 2007 he applied to the magistrate Stellenbosch *ex parte* by means of a notice entitled *"KENNISGEWING IN TERME VAN ARTIKEL 4(2) VAN DIE WET OP VOORKOMING VAN ONWETTIGE UITSETTING EN ONREGMATIGE BESETTING VAN GROND 19 VAN 1998"* for the following order:

> "1. Die Eerste Respondent, asook alle okkupeerders wat onder hom onregmatige okkupasie uitoefen, in kennis gestel word in terme van die bepalings van Art 4(2) van die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond, 19 van 1998 van die aansoek om 'n Uitsettingsbevel soos uiteengesit in die meegaande

3 *O D Thiam v Magee Investments CC t/a Magee Property Investment*, case no A516/2007
4 At 1227H

Kennisgewing van Mosie

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2. Dat die meegaande Kennisgewing van Mosie, tesame met beëdigde verklaring en Aanhangsels daarby, asook die bevel wat hiermee versoek word, deur die Balju van hierdie Agbare Hof op die volgende wyse beteken sal word:

i) Deur ḥ kopie hiervan op Eerste Respondent persoonlik te beteken;
ii) Dat die Balju, addisioneel tot gemelde betekening, ḥ kopie van die dokumente op die voordeur van die struktuur wat geaffekteer word deur hierdie aansoek, vas te heg;
iii) Deur ḥ kopie hiervan per geregistreerde pos op die geregistreerde kantoor van Tweede Respondent te beteken;
iv) Deur ḥ kopie op die Stellenbosch Munisipaliteit te beteken;
v) Dat die dokumente wat beteken word in terme van hierdie bevel in Afrikaans sal wees en in geen ander amptelike landstaal van die Republiek van Suid-Afrika nie."

Attached to the application was a notice of motion addressed to the appellants, together with a supporting founding affidavit and annexures, recording that application was to be made on 29 November 2007 to the magistrate Stellenbosch in terms of section 4(1) of PIE for the ejectment of the appellants from the premises of the respondent, said to be unlawfully occupied by the appellants. The founding affidavit set out the grounds upon which the eviction of the appellants was sought and contained all the information required by section 4(5) of PIE. It may be mentioned that the directions for service which were sought in terms of para 2 of the *ex parte* application were all incorporated in the notice of motion.

[8] The magistrate regarded the *ex parte* application to him as one in terms of PIE for he endorsed the court file as follows:

Vir Appl: B. van Heerden

B. van Heerden:

Vra dat hof aansoek toestaan soos op stukke dit is ń aansoek i.t.v. art. 4(2) van PIE.

Na aanhoor van prok. vir applikant en die deurlees v.d. stukke word die aansoek toegestaan soos versoek.

Keerdatum 29.11.07"

(The reference to a return date is somewhat confusing for no return date, in the sense of the return date of a provisional order, was involved. The date recorded was of course the date on which the application was to be heard.)

The notice of motion for 29 November 2007 and supporting papers were served on the appellants and the municipality on 26 October 2007 i.e. more than 14 days before the hearing on 29 November.

[9] At the hearing on 29 November the sole point in issue was one taken *in limine* on behalf of the appellants, namely that they were entitled to receive and the respondent was obliged to deliver two notices of eviction, one in terms of the procedure prescribed by Rule 55 of the Magistrates' Court Rules and the other in terms of section 4(2) of PIE. Since only one notice was received, it was contended that the application should be dismissed. I should add that as the appellants failed to answer the allegations on which the respondent based the application for eviction, those allegations must be deemed to have been admitted.

[10] The magistrate dismissed the point taken *in limine* holding that since Rule 55 of the Magistrates' Court Rules provided for a minimum of ten days notice to be given to a respondent and since PIE requires 14 days notice to be given to an unlawful occupier, there was no reason why the two notices could not be combined. After having regard to the provisions of section 4(7) of PIE and considering the relevant circumstances, and having regard to the fact that the first appellant recorded in his answering affidavit that the property in question was one of his homes, the magistrate granted an eviction order. The appellants now appeal to this court against this ruling.

[11] No doubt the matter would have been clearer had the order authorising the notice to the appellants been incorporated and served with the papers – in fact the *ex parte* notice indicated that this was to be done – but the first question to be answered is a simple one namely, was the notice contained in the application which the appellants received, notice authorised and directed by an order of court? If this question is answered in the affirmative, the second question is whether it was permissible for the notice to be combined with or incorporated in the notice of motion served in terms of Rule 55.

[12] The magistrate who granted the *ex parte* order, who incidentally was also the magistrate who granted the eviction order, was satisfied that the notice contained in the application which the applicants were to receive was duly authorised and directed by him as his note clearly indicates.

[13] In considering the case for the appellants, one should of necessity have regard to the objective sought to be achieved by PIE. In this connection I agree with and endorse the following view expressed by **Oosthuizen** AJ in the *Thiam*[5] case:

> "The purpose of the PIE Act is to ensure that occupiers of property are not deprived of property except in terms of generally applicable laws, and after a court has considered all relevant circumstances. The PIE Act is not aimed at creating unnecessary and purposeless procedural obstacles to the eviction of occupiers. As long as proper notice of intention to seek an eviction has been served on occupiers, and they have been given a fair and adequate opportunity of drawing all relevant circumstances to the attention of the court seized of the matter, the rights enshrined in Section 26(3) of the Bill of Rights and protected by the PIE Act have been respected."

[14] Counsel for the appellants submitted that what should have happened was that once the magistrate had approved the notice in terms of s 4(2), an approved notice should have been served on the appellants together with a notice of motion. Respondent's counsel questioned why for practical purposes this was necessary. He pointed out that this would have entailed the messenger of the court serving a pack of papers on the appellants which would have contained an

5 *O D Thiam v Magee Investments CC t/a Magee Property Investment*, case no A516/2007

approved notice as well as a notice of motion which would have contained exactly the same information as that which appeared in the approved notice. Accordingly he submitted that there was no reason why two notices could not in effect be combined in the notice of motion.

[15] In my view the notice which the appellants received complied in all respects with the provisions of section 4(5) of PIE and I am also satisfied that such notice, preceded as it was by the *ex parte* application in which the form of the notice to be given was put before the court, was notice duly authorised by the court. In my view there is no reason why the two notices which the respondent is required to give could not be combined in one notice.

[16] Support for this view is to be found in a recent judgment of the Full Court of this division, handed down on 23 July 2008[6]. In that matter, the only defence put up by the respondent in the court *a quo* was that although two notices (i.e. a notice in terms of s 4(2) and a notice in terms of Rule 55) had been served on the respondent, the order for eviction ought not to have been granted as the s 4(2) notice had been defective. The submission was that since *Cape Killarney* required two notices to be given, the eviction order should not have been granted as only one effective notice had been given. The magistrate and this court on appeal rejected that argument and held that read together, the two notices complied with the requirements of s 4 of PIE. Veldhuizen J, who delivered the judgment, pointed out that there is nothing in PIE which prohibits a notice of motion from containing the 'notice of the proceedings' and directions for its service in combination with the main application for the unlawful occupiers' ejectment. He also pointed out that the SCA did not decide in *Cape Killarney* that the notice in terms of s 4(2) could not be contained in the notice of motion issued in terms of Rule 6 of the Uniform Rules of Court.

[17] Finally, there is also another reason why the view adopted by the magistrate may be supported and that is that there is authority for the proposition that even where the formalities required by statute are peremptory, one must consider whether the object of

6 *Ansie Senekal v Winskor 174 (Pty) Ltd*, case no A722/2007

the statutory provision has been achieved where such formalities are not complied with. In this connection the following extracts from the judgment in *Unlawful Occupiers, School Site v Johannesburg*[7] are instructive.

> "As the appellant also correctly pointed out, it was held in Cape Killarney Property (at 1227E-F) that the requirements of s 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved (see eg Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433H – 434B; Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) in para [13])"[8]

> "[24] The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in the circumstances the s 4(2) should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5)."[9]

[18] In the present case we are dealing with an appellant who occupies the premises in question pursuant to an agreement which allowed him to occupy the property with the option to purchase it for a purchase consideration of R3.1 million and with payment for the option being effected in monthly instalments, pending the

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7 2005 (4) SA 199 (SCA)

8 At 209G

9 At p 210D

exercising of the option. Although the option agreement was concluded with the first appellant in his capacity as representative of the second appellant, it is clear from the papers that the property is being occupied by the first appellant who contended that he and his family are entitled to the protection of PIE. The application for eviction was brought on the grounds of the appellants' failure to pay an instalment on due date. In the *School Site* case, the court explained that the purpose of s 4(2) was to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they had under the Rules of Court, to put all the circumstances they alleged to be relevant before the court[10]. The appellants, who were at all times represented by an attorney and knew full well what case they had to meet, chose not to place any circumstances which they alleged to be relevant before the court and contented themselves with the submission that their procedural rights had not been observed. If indeed such rights were not observed, and I make no such finding, I am of the view that the application papers served on the appellants substantially complied with the requirements of s 4(2) and s 4(5) of PIE. In the magistrate's judgment handed down on 6 December 2007, he allowed the appellants time until 16 January 2008 before the eviction order was to be enforced. In my view, it is not necessary to extend this period further.

[18] In the circumstances the following order is made:

1. The appeal is dismissed with costs.

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10 At para [23]

2. The decision of the magistrate is confirmed.
3. The first appellant and all others holding title through him are ordered to vacate the premises at 65 Van der Stel Street, Stellenbosch within three (3) days from the date of this order.

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R B CLEAVER

ZONDI J

I agree.

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D H ZONDI